Lee Guan Seng v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application

HIGH COURT (PENANG) — CRIMINAL APPLICATION NOS 44-39-91 AND 44-45-91
VINCENT NG JC
2 MAY 1992

Constitutional Law *— Preventive detention — Validity — Whether designated officers were required to apply their minds to reports concerning circumstances of arrest and detention before reporting to Minister — Application of de minimis non curat lex — Dangerous Drugs (Special Preventive Measures) Act 1985 s 3(2)(c) — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 3(3)*

The two applicants were detained pursuant to the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') and the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The applicants applied to the High Court for habeas corpus on the ground that the police officers designated by the Inspector-General of Police ('the designated officers'), upon receipt of the reports concerning the applicants' detention, had not applied their minds to such reports. The affidavits of the designated officers merely showed that they received the reports concerning the applicants' detention and they then reported the same to the Minister. The applicants therefore argued that s 3(2)(c) of the Act and s 3(3) of the Ordinance had been breached. The respondents firstly argued that the provisions were complied with once the reports of the designated officers were forwarded to the minister within the stipulated time. The respondents further contended that the maxim de minimis non curat lex applied in this case.

Held, allowing the applications:

(1) Section 3(2)(c) of the Act and s 3(3) of the Ordinance provide that the designated officers 'shall forthwith report' to the Minister and not merely to submit or forward the report to the Minister. The legislature must therefore had intended the designated officers to apply their minds to the reports concerning the applicants' detention before reporting to the Minister. Moreover, the designated officers may order the detention of such persons to cease. This therefore shows that he has essentially to apply his mind to review the report.

(2) It could be inferred from the affidavit evidence in this case that the designated officers had immediately and automatically reported the circumstances of the applicants' arrest and detention to the Minister. The designated officers had therefore acted as rubber stamps by merely forwarding the reports to the Minister.

(3) The maxim de minimis non curat lex was inapplicable where the designated officers had not exercised their minds on the material

placed before them which was essential in a matter as grave as this.

(4) The applicants' detention orders were therefore bad due to non-compliance by the designated officers of the mandatory requirements of s 3(2)(c) of the Act and s 3(3) of the Ordinance.

[Bahasa Malaysia summary

Kedua-dua pemohon telah ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta itu') dan Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan itu'). Pemohon telah memohon kepada Mahkamah Tinggi untuk habeas corpus atas alasan bahawa pegawai polis yang dilantik oleh Inspektor-Jeneral Polis ('pegawai polis yang dilantik itu'), apabila menerima laporan mengenai penahanan pemohon, tidak memberi perhatian kepada laporan itu. Afidavit pegawai polis yang dilantik itu hanya menunjukkan bahawa mereka telah menerima laporan mengenai penahanan pemohon dan mereka kemudiannya telah melaporkannya kepada Menteri itu. Pemohon telah berhujah bahawa s 3(2)(c) Akta itu dan s 3(3) Ordinan itu telah dilanggar. Penentang pertamanya, berhujah bahawa peruntukan-peruntukan itu telah dipatuhi sebaik sahaja laporan pegawai polis yang dilantik itu dihantar kepada Menteri itu dalam masa yang ditetapkan. Penentang juga berhujah bahawa maxim de minimis non curat lex terpakai di dalam kes ini.

Diputuskan, membenarkan permohonan itu:

(1) Seksyen 3(2)(c) Akta itu dan s 3(3) Ordinan itu memperuntukan bahawa pegawai polis yang dilantik itu 'shall forthwith report' kepada Menteri itu dan bukan setakat menyerahkan atau menghantar laporan kepada Menteri itu. Oleh itu, badan perundangan mestilah bertujuan supaya pegawai polis yang dilantik itu memberi perhatian kepada laporan mengenai penahanan pemohon sebelum melapor kepada Menteri itu. Lebih-lebih lagi, pegawai polis yang dilantik itu boleh memerintah supaya penahanan orang yang sedemikian itu dihentikan. Ini menunjukkan bahawa mereka telah pada dasarnya memberi perhatian untuk mengkaji semula laporan itu.

(2) Boleh dibuat inferens daripada keterangan afidavit di dalam kes ini bahawa pegawai polis yang dilantik itu telah dengan segera dan secara automatik melaporkan keadaan penangkapan dan penahanan pemohon kepada Menteri itu. Oleh itu, pegawai polis yang dilantik itu telah bertindak sebagai pak turut dengan hanya menghantar laporan kepada Menteri itu.

(3) Maxim de minimis non curat lex tidak terpakai di mana pegawai polis yang dilantik itu tidak memberi perhatian mereka kepada laporan yang di hadapan mereka yang perlu dalam perkara yang serius seperti ini.

(4) Oleh itu, perintah penahanan pemohon adalah salah kerana pegawai polis yang dilantik itu tidak mematuhi keperluan mandatori s 3(2)(c) Akta itu dan s 3(3) Ordinan itu.]

Cases referred to

1 *Karpal Singh v Inspector-General of Police & Ors* [1989] 1 MLJ 184 (folld)
2 *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297 (folld)
3 *Musa bin Salleh v PP* [1973] 1 MLJ 167 (folld)
4 *Lim Kean Hong v Timbalan Menteri Dalam Negeri Malaysia & Anor* [1990] 1 CLJ 1161 (refd)
5 *Tan Yap Seng v Ketua Police Negara & 2 Ors* [1991] 2 CLJ 1400 (folld)
6 *G Narayanaswami Naidu & Ors v Inspector of Police Mayavaram & Anor* AIR 1949 Madras 307 (folld)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(2)(c), 6(1), 11C
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(3), 4(1)
Maintenance of Public Order Act [Ind] ss 2(2), 15

Karpal Singh (*Karpal Singh & Co*) for the applicants.
Mahmud bin Hj Abdullah (Federal Counsel) for the respondents.

Vincent Ng JC: The detainees were made the subject of a detention order against each of the two respective detainees by the Deputy Minister of Home Affairs (order dated 13 February 1991 in respect of the detainee in application No 44–39–91 and order dated 31 December 1991 in respect of the detainee in application No 44–45–91). The grounds upon which the detention orders were made were that the two detainees were involved in activities relating to the trafficking of dangerous drugs under s 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') and activities prejudicial to public order under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') respectively.

Notwithstanding the grounds stated in the affidavits supporting the relevant applications, the short point taken by counsel for the detainees at the hearing of the matter was that the detention orders ought to be impugned due to breach of s 3(2)(c) of the Act and s 3(3) of the Ordinance in respect of both the above applications. Section 3(2)(c) of the Act reads as follows:

> Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection (1) of section 6:
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> Provided that —
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> ...
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> (c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police

officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

Section 3(3) of the Ordinance reads as follows:

> Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty-days without an order of detention having been made in respect of him under section 4(1):
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> Provided that —
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> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent;
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General of Police or to a police officer designated by the Inspector-General in that behalf and, the Inspector-General or the police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

The material facts, so far as relevant to the point in issue, may be shortly stated thus:

(i) In Criminal Application No 44–39–1991 the affidavit of Penguasa Polis Loo Choo Huat (para 3 of encl 6) showed that he had reported the circumstances of the arrest and detention of the detainees to the designated officer Mohd Said bin Awang at 8.10 am on 31 December 1990 and the affidavit of the latter (para 4 of encl 7) showed that on the same day, he himself (the designated officer) had reported the same to the Minister. No mention was made of the time when the report to the Minister was made.

(ii) In Criminal Application No 44–45–1991, the affidavit of the designated officer Dato' Haji Samsuri bin Arshad (para 1.3 of encl 3) showed that the Timbalan Penguasa Polis Encik Lee Suan Fatt had reported to him the circumstances of the arrest and detention of the detainee on 21 December 1990 and on the same day, he himself (the designated officer) had reported the same to the Minister. No mention was made of the time when the report was received by him or when the report to the Minister was made by him. It was however pointed out by the senior federal counsel to the court that in the affidavit of the Minister (para 5 of encl 5) the latter had said "Saya telah menerima laporan dan maklumat yang berkaitan dengan hal kegiatan penangkapan dan penahanan pemohon oleh pegawai yang ditetapkan dibawah s 3(3)(c) dan saya berpuas hati bahawa pemohon pernah ada kaitan dengan atau yang melibatkan ketenteraman awam. Dengan itu, saya berpuas hati dengan tahanan ke atas pemohon kerana ianya perlu untuk menghalang beliau daripada bertindak dengan apa cara sekalipun yang boleh memudaratkan kepada ketenteraman awam.'

The contention of the learned counsel for the detainees in both the cases was that the affidavit evidence did not in any way show that the designated

officer, in respect of each of the above two cases, had applied his mind to the material before him before he reported to the Minister. The result therefore, said counsel, was that the designated officer might have *immediately* — that is to say, automatically and without any interval of time — upon receipt of the report from the Penguasa Polis Loo Choo Huat (in Criminal Application No 44–39–1991) and Timbalan Penguasa Polis Lee Suan Fatt (in Criminal Application No 44–45–1991), have reported the same to the Minister. If so, said counsel, the designated officer could not have directed his mind to the particular circumstances of the detainees' case and, on this ground alone, the applicants' continued detentions were unlawful.

In coming to a decision in the above applications the court is guided by the following established principles:

(1) In an application for habeas corpus, the onus is on the detaining authority to show that the detention of the subject is lawful. (See *Karpal Singh v Inspector-General of Police & Anor.*[1])
(2) The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. This is the most correct approach for the courts to apply. See *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri.*[2]
(3) Conversely, if the statutory provisions are framed or expressed in a manner which falls short of crystal clear or are equivocal, then, as the power to detain a person without trial strikes at the very heart of freedom of a person in a free country, the detainee should be entitled to the benefit of the more favourable interpretation. (see also *Musa bin Salleh v PP*).[3]
(4) As s 11C of the Act, which precludes the courts from reviewing the minister's order, has imposed upon the courts a very limited scope to exercise its jurisdiction to grant habeas corpus, the courts should under the circumstances, more jealously protect the liberty of the subject.
(5) As such, for the reason in (4) above, the courts and at any rate this court, would be averse to differ from earlier decisions of courts of concurrent jurisdiction which are in favour of the detainees, unless such decisions are based on patently wrong principles or interpretation of the law.
(6) The court has to consider whether the non-compliance is in respect of a mandatory or directory requirement in the Act.
(7) The court has to consider whether the de minimis non curat lex rule is applicable.

It is common ground, and indeed there was no dispute about this, that both the reports required under proviso (c) to s 3(2) of the Act and proviso (c) to s 3(3) of the Ordinance in both the above applications had been submitted within the prescribed 14 and 30 day periods of the detainees' respective detentions. Deliberating the current applications within guidelines (2) and (3) adumberated above after careful reading of the respective affidavits filed, it ought to be inferred that the designated officer had immediately — that is to say automatically reported the circumstances of the arrest and

A detention of the detainees to the Minister after he had received the same. He had thus acted as a rubber stamp in the process of both the said detentions by merely forwarding the report — that he had received from the police officer — to the Minister.

It is axiomatic that in his busy schedule and with myriad other functions to perform, the Minister would essentially have to base his decisions — especially in matters of this nature — on the report or reports of his subordinates; and in this respect, the report of the designated officer, with whom only, by virtue of s 3(2)(c) of the Act and s 3(3) of the Ordinance he has contact.

As the expression in these provisions states that the designated officer 'shall forthwith report' the same to the Minister rather than 'shall forthwith submit such report that he had received from the police officer' to the Minister would mean (upon the aforesaid principle of resolving interpretation of the Act in favour of the detainee) that the legislature had intended there to be a two tier decision or application-of-mind process carried out before the report reaches the minister. The expression 'forthwith' which is found in the English but not in the Bahasa Malaysia version of the Act should not pose any difficulty to the views I have expressed, since the duty placed on the designated officer *to report* and not merely *to forward the report* (a la a postman) would essentially mean that he has to report to the minister as soon as possible.

If such a designated officer is of the view that the detention should cease he may so order, as we ought to bear in mind that at that stage of the whole process of detention, that is, within the 14 and 30 days respectively from detention, the detainees' detention is still for the purpose of investigation in respect of dangerous drugs activities and activities prejudicial to public order respectively.

The learned senior federal counsel submitted that since the reports of the designated officer in respect of both the applications were forwarded to the minister within the 14 and 30 day periods, this should be sufficient compliance with s 3(2)(c) of the Act, upon the authority of *Lim Kean Hong v Timbalan Menteri Dalam Negeri*.[4] Notwithstanding that this court recognizes that the facts in that case are similar to the facts here, it nevertheless does not agree with the implication of the submission that the case (*Lim Kean Hong*[4]) is an authority for the proposition that the designated officer's position is that of a mere rubber stamp or a postman to the Minister. As a result, although the court's decision here runs counter to the decision in the case cited by the senior federal counsel, this court wholly agrees with the views expressed therein by the learned judge, when he said in his judgment (at p 1163I, second column) which I now quote:

> It seems to me that as soon as the Inspector General of Police or the designated officer or the Minister receives the report of the circumstances relating to the arrest and detention of a person and the Inspector General, *the designated officer* or the Minister is of the view that the detention should cease such person *may order the detention under s 3(2) to cease*; otherwise the detention may continue beyond the 14 days but not more than the 60 days which is specified in s 3(2). (Emphasis added.)

This court's view is that if the designated officer may order the detention to cease, he has essentially to apply his mind to review the report from the said police officer.

In this regard I am fortified in my construction of s 3(2)(c) as aforesaid, by the obiter dictum of Edgar Joseph Jr J (as he then was) in the case of *Tan Yap Seng v Ketua Polis Negara*[5] in which the learned judge said and I quote:

> In my view, the word 'forthwith' must be construed according to the circumstances. In 26 *Corpus Juris* p 998, the position is thus stated:
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> > Although the term has received a strict construction, ordinarily it is not to be strictly construed, but should receive a liberal or reasonable construction. Some regard must be had to the nature of the act or thing to be performed and the circumstances of the case.
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> In the context of proviso (c) to s 3(2) in particular, not forgetting that if correctly invoked, it would result in the continued detention of a subject without trial, my view is that it would, prima facie be wrong for the designated officer to submit his report to the Minister immediately.By 'immediately', I mean automatically without any interval of time, for had he done so, it could be argued, with considerable justification, that he could not have directed his mind to the particular circumstances of the detainee's case. In other words, he would lay himself open to the attack that he had acted as a mere rubber stamp.

The maxim de minimis non curat lex is inapplicable in a case such as this where the designated officer appears not to have exercised his mind on the material placed before him, which is essential in a matter as grave as this. In an Indian case of *G Narayanaswami Naidu & Ors v Inspector of Police Mayavaram and Anor*,[6] it was held that if it is established that neither the Provincial Government nor the officer or other authority empowered under s 15 of the Madras Maintenance of Public Order Act has exercised its or his mind on the material placed before it or him, then an order of detention, though purporting to be made under s 2(2) of the same Act, must be deemed to be not an order under s 2.

This court does not accept the senior federal counsel's contention, in respect of application No 44–45–91, that in any event, the Minister's statement (in para 5 of encl 5) that he was satisfied on the grounds and reasons for the detainee's detention, is sufficient to correct the designated officer's default, as it is plainly obvious — nay incontrovertible, that it is the mind of the designated officer that we are concerned with, and the material time when the designated officer has to apply his mind should be the time when he made his report to the minister and not thereafter. The question is not whether a police investigation had been conducted and a complete report thereof sent to the minister. The point is — did the designated officer apply his mind to the material before him as required under s 3(2)(c) and the application of mind must be when he makes his report after he is informed of the circumstances of the arrest and detention. The designated officer did not comply with this material and mandatory requirement in both the above applications.

For the reasons above, it has to follow that both the respective detention orders are bad due to non-compliance with s 3(2)(c) of the Act and s 3(3)(c) of the Ordinance. I allow both the above applications. It follows that both the applicants must be set at liberty forthwith and I so order.